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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 377

THE UNITED STATES, PETITIONER

v.

WILLIAM WINTERS, AND JOHN T. PAYNE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WILLIAM WINTERS & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on July 11, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 39-45) is reported at 84 F. Supp. 756.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1949 (R. 67). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the liability of the successful bidder on a government contract for breach of the obligations imposed by his bid and its acceptance is limited to the security required to be furnished with the bid.

CONTRACT PROVISIONS INVOLVED

The standard government form of bid bond for construction or supply contracts, Standard Form No. 24, approved by the President on November 19, 1926, as used in this case, provides as follows:

> Know all Men by these Presents, That we, WILLIAM WINTERS and JOHN T. PAYNE partners, composing the firm of WILLIAM WINTERS & Co., as Principal, and AMERICAN SURETY COMPANY OF NEW YORK, a New York Corporation, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of EIGHTEEN HUNDRED & 00/100 ($1,800) dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.
>
> The condition of this obligation is such, that whereas the principal has submitted the accompanying bid, dated February 24, 1941, for furnishing all labor and materials and performing all work for clearing and grubbing approximately 368.1 acres at the site of South

Dade County Airport, near Homestead, Florida, under Inv. #436-41-228.

Now, therefore, if the principal shall not withdraw said bid within the period specified therein after the opening of the same, or, if no period be specified, within sixty (60) days after said opening, and shall within the period specified therefor, or, if no period be specified, within ten (10) days after the prescribed forms are presented to him for signature, enter into a written contract with the Government, in accordance with the bid as accepted, and give bond with good and sufficient surety or sureties, as may be required, for the faithful performance and proper fulfillment of such contract, or in the event of the withdrawal of said bid within the period specified, or the failure to enter into such contract and give such bond within the time specified, if the principal shall pay the Government the difference between the amount specified in said bid and the amount for which the Government may procure the required work and/or supplies, if the latter amount be in excess of the former, then the above obligation shall be void and of no effect, otherwise to remain in full force and virtue.

* * * * *

STATEMENT

This action was brought to recover progress payments withheld from a contractor to compensate the United States for damages resulting from the contractor's default on his bid on an earlier con-

tract (R. 1-3). The Court of Claims awarded judgment against the Government for the sums withheld after deducting the amount named in the bond furnished as security for the bid (R. 45, 67).

On February 8, 1941, the United States invited bids for clearing and grubbing approximately 368.1 acres of land located near Homestead, Florida, as part of the construction of an airport (R. 32). The invitation required bids to be accompanied by security to insure the execution of the formal contract and a performance bond (R. 46). In response to this invitation respondents submitted their bid to perform the work for $17,996.41, accompanied by a bid bond in the penal sum of $1,800 (R. 32). See p. 2, *supra*. As the lowest bidder, respondents were notified on March 7, 1941, by telegram: "Your company awarded contract for clearing and grubbing airport at Homestead, Florida. * * * Contract papers being mailed for execution" (R. 34). A letter, enclosing copies of the formal contract and performance bond for execution, was mailed on the following day to confirm the telegram (R. 34).

Respondents were unable to obtain the performance bond required by the contract and they notified the Government of this inability on March 20, 1941 (R. 35). On April 4, 1941, they were notified that their right to proceed was terminated for failure to furnish the requisite performance bond (R. 35).

On March 27, 1941, anticipating the necessity that respondents would not secure bond and to save further loss of time, the Government readvertised the same work (R. 35). In response to this second invitation, respondents again submitted the lowest bid which was again accepted (R. 36). On April 14, 1941, respondents were notified of the acceptance of their second bid by letter which stated that acceptance of the contract under the second invitation did not relieve them of any liability for breach of their obligations under their first bid (R. 36).[1] This second bid was nearly twice the amount of the first, and the necessary perform-

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[1] No point was made, nor could it be, in the court below to the effect that the notice to respondents as to their liability, contained in the letter of April 14, 1941, was the first caveat to respondents by the Government. Immediately subsequent to the receipt of respondents' notice, on March 20, 1941, of their inability to proceed, and their request, on March 25, 1941, for an extension of time (R. 35), the Government notified respondents, in granting an extension until April 1, 1941, that the work would be re-advertised upon respondents' failure to perform and any excess costs involved would be charged to respondents and their surety. The termination letter sent to respondents by the Government on April 4, 1941 (R. 35), prior to the opening of bids and the award of the contract on the re-advertisement, not only advised respondents that their right to proceed on the first award had been terminated but also specifically advised them that they would be held responsible for all excess costs or damages incurred in the completion of the work covered by their first bid.

It should be noted that the re-advertisement of the contract by the Government on March 27, 1941, a few days prior to the termination of respondents' time in which to perform as extended by the telegram of March 26, 1941, was specifically subject to cancellation in the event that respondents succeeded in obtaining the necessary bonds on the original award (R. 35). Respondents were so advised (R. 35).

ance bond was furnished (R. 36). During the performance of the second contract the Government withheld from the progress payments due respondents the difference between the amount of their first bid and the amount of the second contract (R. 37-38). This action was brought to recover this amount.

With Judge Littleton dissenting, the Court of Claims held that the requirement for a security bond in the amount of $1,800 limited the contractor's liability for breach of contract for failure to carry out the requirements of its bid to that amount, and awarded judgment in the sum of $16,093.34, "the unpaid balance of the contract price under the second contract less the $1,800 for which the plaintiffs became liable upon the nonfulfillment of the condition in their bid bond given with the first bid" (R. 45).

REASONS FOR GRANTING THE WRIT

The decision of the court below violates basic principles of contract law of considerable importance in connection with the procurement functions of the United States, is in direct conflict with decisions of the Court of Appeals for the First Circuit on the same question, and contravenes the practices established for a long period of years by the financial officers of the Government.

1. In holding that the bidder's liability for breach of the obligations of his bid is limited to

the amount of security he is required to furnish, the instant decision presents a square conflict with the decisions of the Court of Appeals for the First Circuit in *United States* v. *Conti,* 119 F. 2d 652, and *Conti* v. *United States,* 158 F. 2d 581, which are in harmony with the rulings of this Court.

It is well established that a binding agreement is consummated, although a formal contract is not executed, when a bid is accepted by the United States. *Garfielde* v. *United States,* 93 U. S. 242, 244; *Harvey* v. *United States,* 105 U. S. 671, 688; *United States* v. *N. Y. & P. R. SS. Co.,* 239 U. S. 88; *United States* v. *Purcell Envelope Company,* 249 U. S. 313, 319-320; *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75. The inability of respondents to furnish the performance bond called for by their bid was clearly a breach of contract which, under the usual rule, would subject them to liability for damages measured by the additional cost to the Government in completing the work under the contract. *United States* v. *McMullen,* 222 U. S. 460, 471; *United States* v. *Purcell Envelope Co., supra; Mundy* v. *United States,* 35 C. Cls. 265, 288; *McGowan* v. *United States,* 35 C. Cls. 606, 619-620; *Waters* v. *United States,* 75 C. Cls. 126.

The decision below holds, however, that, because the Government required security in addition to the bidder's promise in order to insure the execution of the contract and a performance bond (see

Standard Government Instructions to Bidders, 41 CFR 12.22(8)), it thereby placed a ceiling upon the bidder's liability for breach of contract. No sound basis for such a result is suggested, and it is not justified by any principle in the law of suretyship or contracts. A surety's obligation or a deposit as security may be less than the amount of the principal obligation and may be intended to do no more than provide "an assurance fund" for its collection. See Security Restatement (1941), Section 82 comment (g); Contracts Restatement (1932), Section 340 comment (a); Stearns, *Law of Suretyship* (1934), Sections 125, 245. Cf. *Amer. Surety Co.* v. *Bethlehem Bank,* 314 U. S. 314. No limiting provisions are found in the provisions of the contract, whether it be considered the bid and acceptance or the formal document which respondents were bound to execute, and it is doubtful that the instrument of security can modify the obligation which it guarantees in the absence of any affirmative indications that it was intended to do so. There is no evidence whatsoever of such an intention here and, in fact, the bid bond contains language which affirmatively suggests that the ordinary measure of damages was intended to be applicable. The bid bond provides that if the principal breaches his obligation the undertaking of the bond shall remain in effect unless "the principal shall pay the Government the difference between the amount specified in

said bid and the amount for which the Government may procure the required work." This statement of one of the conditions of the bond is entirely inconsistent with the view that the bond was intended to reduce the Government's maximum recovery for the bidder's breach of contract. The Court of Appeals for the First Circuit reached an opposite, and we believe correct, conclusion in the *Conti* cases, *supra*. It held that the dollar amount required as security was not intended "to be regarded as liquidated damages in case the contractor should be guilty of a subsequent breach of contract" (119 F. 2d at 655) and that the measure of damages was the difference between the bid price and the reasonable cost of completing the work (119 F. 2d at 656; 158 F. 2d at 583, 584).[2]

The reliance of the court below upon *United States ex rel. The International Contracting Co.* v. *Lamont*, 155 U. S. 303, for its conclusion that the parties did not intend two contracts for the same work to coexist seems correct but irrelevant to the question of the contractor's liability. The Government's theory was that the first contract

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[2] The security furnished in the *Conti* cases was a certified check rather than a bid bond. The Standard Government Instructions to Bidders, to which the invitation for bids referred respondents here (R. 46), state that where security is required "the bidder, at his option, may furnish a guaranty bond, a certified check," or other specified security. 41 CFR 12.22 (8). Obviously, the scope of the principal obligation does not depend upon the type of security which the bidder selects.

was breached by the contractor and that all that remained of it, when the second contract was entered, was the contractor's obligation to respond in damages for its breach. The court's adoption of this theory is evidenced by its allowance of damages to the Government of $1,800, the amount of the bid bond. The only issue below and here is whether recovery must be limited to the amount of the security. The *Lamont* case did not touch upon the question of damages. There a contractor who had voluntarily entered a contract with the Government attempted by mandamus to compel the Government to execute another contract for the same work based upon a previous bid which was accepted by a government officer and later withdrawn. The Court properly held that two contracts for the same work could not coexist and denied the mandamus application. There was no question in the case, however, of the Government's breach of contract or its liability for breach if one occurred.

2. The decision below also contravenes the long-standing government interpretation and the understanding of government contractors generally with respect to the purpose and effect of the standard form bid bond. The requirement of a bid bond as security has never been considered as curtailing the Government's right to complete recovery of its losses from a defaulting bidder. The Comptroller General has ruled on many occasions that the bid

bond does not limit the defaulting bidder's liability for the full amount of the Government's excess cost but merely defines the collateral liability of the surety. 17 Comp. Gen. 815; 18 Comp. Gen. 54. More significant, perhaps, is the recognition by bonding companies that the bidder's liability is not affected by the requirement of a bid bond. In McGuire, *Matters of Procedure Under Government Contracts* (1939), published by Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, the defaulting bidder's obligation, notwithstanding the execution of a bid bond, is defined as follows: "If the bidder should fail in any respect to do these things [execute the required standard form contract and furnish a performance bond with good and sufficient surety], he becomes liable to the United States for the difference between his bid and the amount the Government may be required to pay to have the contract performed" (p. 15).

3. The resolution of the conflict between the Court of Claims and the Court of Appeals for the First Circuit is important in connection with the procurement functions of the United States. Bid security is a normal requirement in the process of awarding government contracts and the bond involved in this case is in general use as the standard form of bid bond approved by the President on November 19, 1926. 41 CFR 12.24. In both the *Conti* case and in this case the actual damages

were approximately ten times the face amount of the security. Whether the use of the bond as security assures the Government the collection of only a small fraction of its loss, at the expense of its cause of action against the bidder for a much larger amount, is a matter of obvious practical importance to the Government's contracting officials.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1949.

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CHARLES ELMORE CROPLEY
CLERK

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THE UNITED STATES,

Petitioner,

v.

WILLIAM WINTERS and JOHN T. PAYNE, co-partners doing business under the firm name and style of WILLIAM WINTERS & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Claims (R. 39-45) is reported at 84 F. Supp. 756.

Jurisdiction

The judgment of the Court of Claims was entered July 11, 1949 (R. 67). The petition for a writ of certiorari was

filed October 7, 1949 and notice thereof together with a Transcript of Record was served upon respondents on November 3, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. §1255.

Question Presented

The only question presented by the petition for writ of certiorari is:

Assuming, as the Court of Claims does, that a first contract binding upon respondents resulted from a given set of events, does the Court's decision that all rights and liabilities thereunder were superseded and waived when respondents and the Government entered into a second contract covering the same subject matter, but for a different price and with an additional guaranty of performance by a surety, "violate basic principles of contract law," "conflict with decisions of the Court of Appeals for the First Circuit," or contravene "practices established for a long period of years by the financial officers of the Government?"

Outline of the Case

This was a suit against the United States on a contract. The facts are briefly as follows: On February 8, 1941, the Government invited bids for the clearing and grubbing of certain acreage near Homestead, Florida, as a part of the construction of an airport (R. 32). Respondents submitted the low bid, but it was so low that respondents were unable to procure the performance and

payment bonds required by the Government and as a consequence never executed a definitive contract (R. 35).*

The Government then readvertised the identical work covered by its first invitation and in response thereto respondents submitted a new and higher bid. Pursuant to this second bid, respondents secured performance and payment bonds and a formal, definitive contract was executed by respondents and the Government under date of April 11, 1941 (R. 36). Respondents satisfactorily completed the contract (R. 38), but the Government refused to pay respondents the full contract price (R. 38).

Upon special findings of fact, the Court of Claims held that, even assuming a contract arose out of the first set of events occurring prior to the execution of the concededly valid contract of April 11, 1941, all rights and liabilities under such first contract were superseded and waived when respondents and the Government entered into the second contract of April 11, 1941, covering the same subject matter but for a different price and with the additional guaranty of performance by a third party.

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* The Government has never contended nor do the findings of fact or decision by the Court below in any way indicate that respondents' actions were fraudulent or even constituted "sharp practice" (R. 41). In fact, even though their efforts met with eventual failure, respondents went so far as to request and obtain an extension of time in which to renew their attempts to produce the required performance and payment bonds at the time of the first invitation (R. 35).

ARGUMENT

I

The decision of the Court of Claims can scarcely be said to "violate basic principles of contract law" since it rests squarely upon a decision of this Court.

The instant case is the exact reverse of the situation presented in *United States ex rel. International Contracting Company* v. *Lamont,* 155 U. S. 303. In that case it was assumed that the Government and International had entered into a valid contract to do certain dredging work at 19.7 cents per cubic yard. Refusing to permit performance under this first contract, the Government readvertised and International bid again, this time at a lower price of 13.7 cents per cubic yard. The Government awarded International a second contract pursuant to its second bid. The work was performed and the lower price paid. International failed in its attempt to make the first contract (and the higher price) stand, for the Court held that any rights and liabilities flowing from the first contract were waived and superseded by the execution of the second contract between the same parties covering the same subject matter but containing an inconsistent term—that of price.

In the light of the *Lamont* case, it is inconceivable that the Government may reap the benefit of a lower price in a second contract covering the same subject matter but not be bound by a higher price in a second contract, especially when, as in the instant case, it also receives along with the second contract the additional guaranty of a third party. As the Court of Claims puts it in referring to the *Lamont* case:

> "If that is the law when it works to the advantage of the Government, it is the law when it works to the advantage of the citizen" (R. 45).

The citations by the Government to the effect that a binding agreement is consummated when a bid is accepted by the United States (although a formal contract is not executed) and further, that the usual rule is to measure damages by the additional cost to the Government in completing a contract (Br. for Petitioner, 7) are not in point.

In the first place, the decision of the Court of Claims assumes a first contract. Secondly, the question is not, as the Government's "Question Presented" would indicate (Br. for Petitioner, 2) a question of what the Government might be entitled to recover in damages if, with an initially similar set of events, it had chosen or been forced to let the contract to a second and different contractor at a higher price. What makes this case "unique", as the Court of Claims put it (R. 41) is that the Government did exactly the opposite—*i.e.*, it entered into a second contract with respondents covering the same subject matter but at a different price. The *Lamont* case, *supra,* is authority that in such an event the second contract completely supersedes all rights and liabilities under the first contract.

II

The decision of the Court of Claims is not in "direct conflict with decisions of the Court of Appeals for the First Circuit."

In asserting this so-called direct conflict with decisions of the Court of Appeals for the First Circuit, the Government is apparently relying on the case of *United States* v. *Conti,* 119 F. (2d) 652 (Br. for Petitioner 7, 9, 11). The facts in that case parallel those of the instant case pre-

cisely to the point where there has been a default on the part of the lowest bidder in the first round of bidding for a Government contract. But the parallel ceases at the very point where the question at issue here begins, for the defendant in the *Conti* case never made a bid on the re-letting nor entered into a second contract with the Government covering the same subject matter. The instant case involves solely the effect and consequences of the Government's permitting respondents to bid upon the re-letting and then, when respondents were again the successful bidders, proceeding to enter into a contract with them covering exactly the same subject matter but at a different price.

III

The decision of the Court of Claims does not contravene "practices established for a long period of years by the financial officers of the Government."

The instant case, as the Court of Claims has pointed out, is "unique." It is doubted that it has ever been "established practice" for the Government to contract, after a readvertisement and a second round of bidding, with the very same party who, because he could not produce acceptable performance and payment bonds, was not permitted to proceed with a contract awarded him following the first round of bidding.

In any event, no harm of any consequence can be occasioned the Government by the Court's decision below inasmuch as no door need be opened to sharp practice by bidders in any subsequent situation. The Government could uniformly treat a bidder who defaults, whether in good faith or bad, as ineligible for a contract on the second round of bidding. Also, the Government could insist upon a much more substantial bid bond—one which would

adequately cover not only the overhead and cost of re-letting a contract, but also approximate, at least, the estimated loss to the Government if the work must be performed by another party at a higher price. Either method (or both used in conjunction, perhaps) would be consistent with established contracting practices and foreclose the possibility of the Government's suffering a consequential loss. On the other hand, to reverse the equitable result which the Court of Claims reached would not only be unfair to respondents but would also permit innocent guarantors of performance to be misled into the belief that they were guaranteeing performance of a contract at the price stated therein rather than, in effect, at a price stated in a previously proffered contract which was so inadequate that no guarantor of performance could be obtained therefor.

CONCLUSION

The decision of the Court of Claims below is correctly rested upon a decision of this Court, in no way conflicts with applicable decisions of the Court of Appeals, First Circuit, and does not, or need not, upset established Government contracting practices. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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